No.47868-4-II

#15-1-000056-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

THE PERSON IDENTIFIED BY THE STATE IN THIS PERSISTENT OFFENDER PROCEEDING AS ANTHONY A. MORETTI,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Trial Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant, identified by the state in this Persistent Offender Accountability Act (POAA) case as Anthony Moretti, was deprived of his due process rights to a fair trial and his rights to trial by jury by the admission of extremely prejudicial testimony and the trial court erred in denying a mistrial.

2. Appellant was also deprived of his rights to a fair trial and trial by jury improper opinion testimony on guilt, veracity and credibility, and the state cannot meet its heavy burden of proving the constitutional error "harmless."

3. The prosecutor committed repeated, flagrant, ill-intentioned and prejudicial misconduct which ultimately deprived appellant of a fair trial.

4. Appellant was deprived of his Article 1, § 22, and Sixth Amendment rights to effective assistance by appointed counsels' unprofessional, prejudicial failures.

5. The POAA sentence violates Article 1, § 14, and the less protective 8th Amendment, under "proportionality" analysis as properly applied to both crime and offender.

6. The sentencing court violated appellant's Sixth Amendment, Article I, §§ 3 and 21, rights to proof beyond a reasonable doubt and trial by jury when the judge made factual findings required under RCW 9.94A.030(37)(a) required for imposition of a "Persistent Offender" sentence.

7. The findings necessary under RCW 9.94A.030(37)(a) exceed the narrow "fact of a prior conviction" exception first set forth in Almendarez-Torres v. United States[1] and clarified by the 2016 decision of Hurst v. Florida.[2] Cases to the contrary, including the 2014 decision in State v. Witherspoon,[3] are no longer good law.

8. The prosecution failed to meet its burden of proving that a POAA sentence must be imposed.

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[1] 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

[2] __ U.S. __, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

[3] 180 Wn.2d 875, 329 P.3d 888 (2014).

9. The trial court erred under RCW 10.01.160 and State v. Blazina,[4] in failing to consider appellant's actual ability to pay as required prior to imposition of costs and terms for legal financial obligations and costs of incarceration.

10. Appellant assigns error to the pre-printed "findings" on the judgment and sentence which were selected by the court and provide in relevant part as follows:

> 2.5 **Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:
>
> ☐ The defendant has/will have the ability to pay the restitution and legal financial obligations in the future.
>
> ☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):_____
>
> ☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.
>
> ☐ (Name of agency) ___'s costs for its emergency response are reasonble. [sp] RCW 38.52.430 (effective August 1, 2012).
>
> ☒ The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 126.

11. If this Court chooses to adopt the procedures Division One crafted in State v. Sinclair,[5] and change its positions regarding imposition of costs on appeal, interpreting Sinclair to apply a presumption that appellate costs will be imposed on an impoverished person who has exercised his constitutional right to appeal unless he objects and proves

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[4]182 Wn.2d 827, 344 P.3d 680 (2015).

[5]192 Wn. App. 380, 367 P.3d 612 (2016).

such costs should not be imposed is in direct conflict with the Supreme Court's decision against such a presumption in State v. .Nolan,[6] and is further unconstitutional under Fuller v. Oregon,[7] and State v. Blank.[8]

12. Even if this Court were to change its position that Blazina, supra, applies directly to the determination of imposition of costs on appeal because it interprets a different statute, the holding of Blazina provides sufficient evidence that our system of imposing costs on appeal in indigent cases is no longer constitutional and Blank no longer controls.

13. This Court should not exercise its considerable discretion to impose costs on appeal on an indigent appellant who has exercised his constitutional right to appeal where he has been sentenced to serve life without a hope of release and the ongoing presumption of indigence has not been rebutted.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. During trial, over objection, the prosecutor elicited testimony from officers about what they believed the evidence meant, that they suspected appellant and he and another man were the "only" suspects, and more. Throughout trial, the prosecutor repeatedly asked inappropriate questions designed to invoke improper answers. In closing, the prosecutor then vouched for the credibility of the state's crucial witnesses, told the jury the "givens" in the case included the defendant's guilt and repeatedly said there had been "no doubt" created regarding guilt, noting the opinions of officers regarding guilt, credibility and veracity the prosecutor had improperly elicited. And the prosecutor specifically described appellant, during trial, as the "codefendant" and "coconspirator" of the only man positively identified by a witness who knew him and said he was involved.

Does this direct and nearly direct opinion evidence on guilt, veracity and credibility compel reversal? Did the trial court err in denying a mistrial? Further, is reversal required where the misconduct was so pervasive it infected the

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[6] 141 Wn.2d 620, 8 P.3d 300 (2000).

[7] 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

[8] 131 Wn.2d 230, 930 P.2d 1213 (1997).

whole trial, there is more than a reasonable probably that the objected-to misconduct affected the verdict and the misconduct not objected to below could not have been cured by instruction? If a curative instruction would have been effective, should reversal be granted based on counsel's unprofessional failure to attempt to minimize the prejudice to his client?

2. To prove that a person meets the definition of a "persistent offender," the prosecution must show not just the existence of prior convictions but also specific facts relating to those convictions including the order in which they occurred, that they are specific types of offenses and that they occurred within a particular order and timing. Do those facts exceed the narrow "prior conviction" exception of Almendarez-Torres and is the state required to therefore prove those facts to a jury, beyond a reasonable doubt?

3. The POAA was intended to provide proportional and predictable sentencing for that limited group of offenders which is the most likely to be a danger to society. Does it violate the prohibitions against "cruel" and "cruel and unusual punishment" to impose such a sentence without considering proportionality of not only the offense but the offender, especially where, as here, appellant was a young adult at the time of his first "strike?" Further, is imposition of a sentence of death in prison cruel and cruel and unusual punishment under the facts of this case?

4. Did the prosecution fail to meet its burden of proving that appellant was a "persistent offender" and that a POAA sentence should be imposed where the evidence in the record shows that he was affirmatively misadvised that one of his prior crimes amounted to a "strike?"

5. Did the trial court err in failing to follow the mandates of Blazina and consider appellant's actual ability to pay prior to imposing legal financial obligations and terms?

6. To the extent that Sinclair might be seen to create an additional briefing requirement which amounts to a presumption of imposition of costs on appeal against an indigent person who has exercised his constitutional right to appeal, does Sinclair run afoul of Nolan and the constitutional requirements of Fuller as set forth in Blank?

7. Should this Court decline to impose costs on appeal against an indigent appellant ordered to die in prison with no hope of release, despite the lack of evidence of any change in his

indigence and the unlikelihood of it ever changing?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant, identified by the state in this Persistent Offender Proceeding as Anthony A. Moretti, was charged by amended information with first-degree robbery and two counts of second-degree assault. RCW 9A.36.021(1)(c); RCW 9A.56.200(1)(a)(i); RCW 9A.56.200(1)(a)(iii); CP 8-9. Pretrial and trial proceedings were held before the Honorable Judges David Edwards, Stephen Brown and F. Mark McCauley on January 6, March 2, 16 and 23, April 13, May 4, 11 and 18, June 1 and 15, 2015, after which trial was held before Judge McCauley on July 14-16, 2015.[9] The jury found appellant guilty as charged and, on July 24, 2015, Judge McCauley ordered him to serve life in prison without any possibility of parole, a mandatory sentence under the Persistent Offender Accountability Act ("POAA"). RP 420; CP 125. Appellant filed a notice of appeal and this pleading follows. See CP 147.

2. Testimony at trial

On September 11, 2014, Michael Knapp and Tyson Ball went to meet a woman who was going to sell them methamphetamine ("meth") at a boat launch. RP 38-39, 107, 111. Knapp had hit the "jackpot" at a

[9]The verbatim report of proceedings consists of 7volumes, which will be referred to as follows:
-the proceedings of March 2 and 23, 2015, as "1RP;"
-May 11, 2015, as "2RP;"
-voir dire and opening argument of July 14, 2015, as "3RP;"
-jury instructions of July 16, 2016, as "4RP;"
-the three chronologically paginated volumes containing the proceedings of January 6, March 16, April 13, May 4, May 18, June 1 and 15, July 14, 15 and 16 and 24, 2015, as "RP."

casino about five days before and still had about $900 of the $1250 he had won. RP 109, 156, 158, 202. Knapp and Ball had been communicating with someone they knew as "Jon," a guy they had met on "the streets," actually named Jonathan Charlie. RP 110-12. Knapp did not know the woman they were supposed to meet while Ball said he sort of "street knew" her. RP 113, 157.

At the later trial, Knapp would say that Ball had made all the arrangements for the drug deal over the phone. RP 157. In contrast, Ball would say it was Knapp who had called to set up the drug deal and Ball was just helping by texting Charlie. RP 136.

Knapp and Ball had used drugs together in the past. RP 110. In fact, Ball admitted, the two had used "meth" before going to the boat launch that day. RP 110. Ball described himself as both "high" on methamphetamine ("meth") and "pretty drunk" at the time. RP 110, 124, 136. This was not an unusual condition for Ball, who could not recall when he woke up that day and said in general he would sleep whenever he felt like it and just did not have a normal daily schedule due to his drug habit. RP 146-47. When he got up that morning, he did some meth. RP 147. A little later he had several mixed drinks and more meth. RP 147.

While Knapp would claim not to remember drinking or doing drugs that day, Ball affirmed that Knapp had also been doing the "meth" they already had. RP 138. Ball had no idea how much it was or how much they had left when they went to buy more. RP 138-39. Ball claimed he was not "tweaking" or hearing voices and when he "tweaked" on methamphetamine after staying up on the drugs later it did not take him

"to that point." RP 139. In fact, he said, "tweaking" happened with people who cannot handle their drugs but, he boasted, "I can handle my stuff." RP 139, 140.

Ultimately, however, he conceded that, within the previous month, he had "tweaked" and freaked out from staying up too long and smoking too much meth. RP 140.

The testimony of Ball and Knapp would differ on more than whether they were both "high" that day and who had set up the drug deal. Both said they went to the ramp and met a woman who had a child in the car with her. RP 112-13, 137-38. Both agreed the woman did not have any drugs and Charlie was not there. RP 114, 137. Ball thought the woman's behavior seemed "[n]ervous," which Ball said made him and Knapp feel "kind of iffy" and wondering what is going on. RP 114.

But Ball described the car the woman drove very specifically, as a "silver Dodge Plymouth Neon." RP 113. Knapp, in contrast, was sure the car was blue. RP 159, 186. Ball said Knapp had his money and the meth they already had tucked into a cigarette pack. RP 124. Knapp did not recall having a cigarette pack and denied that he would use a pack to hold his money. RP 189.

At trial, Knapp testified that he drove his truck to the meet up, and the truck had "camo" paint all over it. RP 159-60. He denied "confusion" about what vehicle he had been driving, saying that officers did not see his truck where it was parked and so they thought a truck he had been standing next to, a Toyota, was his. RP 160, 183-84. And he denied ever saying he had driven a different car. RP 183-84.

On cross-examination, however, when confronted with his signed, written and sworn statement to police, Knapp conceded he had told them that he drove a "green Rodeo" - not a truck. RP 185. He said at trial, "[t]hat's wrong" but did not attempt to explain the discrepancy further. RP 185.

Both men would say the woman they met with had no drugs so the two men drove away. RP 114, 162. They returned, however, because the woman called them and asked for a 'jump" for her car, saying the battery was dead. RP 115, 162. The woman had a young child with her so they decided to return to help. RP 116.

At the trial, Ball would say there was no one else there when he and Knapp returned to the boat ramp. RP 116. But in earlier statements and testimony, he had said to the contrary. RP 116.

Ball would describe what happened next as follows. He got out the jumper cables and started working on the woman's car. RP 116. As he was doing so, "somebody popped out of the bushes" to their right and walked down the boat launch. RP 117. Ball continued working as the man came back to the cars and introduced himself to Knapp as "Mike." RP 117. The man then "bummed" a cigarette from Knapp and walked away. RP 117. Ball thought the woman whose car they were working on seeming "way more nervous" and Ball opined the man's behavior also seemed odd to him. RP 117.

According to Ball, the man returned a few moments later, this time asking Knapp for a "light." RP 118-19, 121. As they were talking, Ball said, the man pulled out a small "bat" from his pants and struck Ball on

the arms. RP 118-21. Ball claimed to have pushed Knapp behind him for the older man's safety while Ball got hit on the arms hard enough that the bat broke. RP 118-21.

At that point, Ball said, another man came out of the bushes carrying an "ASP," a collapsible-type baton, and hit Ball in the head. RP 120-21, 254-55. Then Ball thought both men were attacking Knapp and when he tried to help, the guy with the ASP chased Ball down while the other man was "beating Mike up." RP 120-24. While this was happening, Ball said, the men were saying, "give me the money." RP 123.

At trial, Ball would testify that both the attackers also had knives. RP 123. Ball said Knapp had a knife with him and Ball thought it had fallen out from "wherever" and one of the men had grabbed it. RP 123. But Ball would later change his mind and say he did not think Knapp had pulled out his knife and had not seen it. RP 134-35. After maybe a minuted Ball saw one of the men pick something up and assumed it was the cigarette pack with the money and meth. RP 124. The assailants then "took off," which Ball thought was "because they got what they wanted." RP 124.

At that point, Ball said, Knapp got up, got in his truck and drove off without Ball. RP 125. Ball thought the men ran in a different direction than the woman with the car but also that she had turned and headed the other direction. RP 127.

At trial, Knapp would give a starkly different serious of events. RP 186. Knapp was sure that the attack started immediately after they pulled up and Ball got out. RP 162. Indeed, Knapp denied that anyone came

over to talk to them. RP 186. No one introduced themselves as "Mike" to him. RP 186. No one "bummed a cigarette" and then walked away. RP 186. No one came over to ask for a "light." RP 186-87. And Knapp did not think Ball had done anything to try to start the woman's car. RP 186-87.

Instead, Knapp said, when he pulled up and Ball got out, "this other person, Sam, came running out of the bushes with a baseball bat." RP 162. Knapp recognized the man as "Sam Hill," someone he knew. RP 163. Knapp was just getting out of the truck, so he walked over to help Ball and then another man jumped out of the pushes and started hitting Knapp with a club "like a cop carries." RP 162-63.

Knapp tried to defend himself by pulling out a "little open face" knife. RP 166, 187. It did not work, he said, because he still got "beat down." RP 166. They kept hitting him when he was on the ground, saying they wanted his money. RP 167. Knapp did not see the money being taken or who had taken it because he was just focused on getting into his truck and driving away. RP 125, 167. He stopped the truck picked up Ball, who was walking on the road. RP 125, 167.

The whole incident lasted maybe a minute or two. RP 125. Knapp drove to a warehouse he had access to in order to call police. RP 128. Ball did not want to talk to police so he took off. RP 128. Ball never got his injuries checked out but said he had a knot on his arm and one on the side of his head. RP 126.

When police arrived, Knapp lied about the incident. RP 170, 188-89. Knapp told officers that he had been at the launch with someone

named "Tyson" but denied knowing his last name. RP 188. He also told officers he did not know how to contact "Tyson" or where he lived. RP 188.

At the time, Ball and Knapp were living together and had been for some time. RP 154, 188. Knapp maintained, however, that it was not really a lie when he said he did not know Ball's last name, claiming he had not known the name despite living with the other man for more than a month. RP 189.

Knapp admitted, however, that he had made a deliberate decision to lie to police about how the entire incident had occurred by omitting from his description everything about drugs. RP 170, 189.

Grays Harbor County Sheriff's Office (GHCSO) Detective Keith Peterson, Deputy Sheriff Eric Cowsert and Sergeant Don Kolilis responded to the call. RP 38-39, 63. At the scene, police found a "bat" which did not have the handle, a cigarette with what appeared to be "some blood" on it which had not been smoked, and a tissue which had what appeared to be "some blood" on it. RP 66, 212. Cowsert described Knapp as "covered in dry blood," with a laceration above his left eye and wearing clothing which appeared to have been "blood soaked." RP 40-41. Knapp met them back at the launch. RP 40-41.

When he spoke to the deputies, Knapp did not tell them he had been to the boat launch twice that day. RP 53. He also omitted everything about drugs. He said nothing about making arrangements to meet Charlie at the boat launch to buy meth. RP 170. He said nothing about going there for the purpose of buying drugs. He said nothing about meeting the

woman there for drugs and leaving when she did not have them. RP 170, 189.

Knapp lied, he said, because he saw "no sense" in telling the truth that the incident had occurred as a failed drug deal as he had not actually ended up with drugs. RP 170.

In fact, at trial, Knapp was unwilling to admit that he had been drinking or doing meth that day, despite what Ball had said. RP 184. At first, he could not say whether he had gone to the boat launch to buy more meth in order to "get" or "stay" high but then settled on "get," implying he was not high at the time of the incident. RP 194.

Knapp had injuries on his arms, forehead, back of his head and ear, which he said was "split open." RP 168. At the time of trial, he said he still got headaches "and stuff." RP 168. Knapp did not go to the hospital for his injuries, however, saying that he should have but did not have insurance. RP 171.

Deputy Peterson testified that police tried to identify the people involved, starting with the name of the man Knapp had recognized, Sam Hill. RP 233. Cowsert determined that Sam Hill lived not too far away, so police went and talked to him, finding him heading into town. RP 77-78. Hill was carrying a knife and had blood all over himself from what officers described as "self-inflicted wounds on his neck, on each side, both wrists." RP 238. They spoke to him about what had happened but did not do a "formal written interview." RP 78. Instead, Hill was detained and taken to the hospital, after which he was arrested. RP 231-32.

Over defense objection, Peterson was allowed to testify that the

officers were able to "identify" that a woman named "Halli Hoey" who knew Hill was involved and someone named Jon, later identified as Jonathan Charlie. RP 232. The officer was also allowed to testify, again over objection, that police had looked at text messages on a phone and that was where the information was from. 2RP 233. In addition, the officer was allowed to testify that the texts he saw indicated that Charlie had been involved in arranging the meeting at the boat launch, although the jury was instructed they could only consider that information for the purposes of understanding "why the officers did what they did," not for the truth that Charlie and Hoey were involved. RP 233.

Peterson said through their investigation they had gotten information about Charlie and would still like to talk to him. RP 234.

A few days after the incident, police interviewed Ball. RP 150. By then, Ball had talked repeatedly with Charlie about what had happened. RP 150. In fact, Ball had been texting with Charlie "the whole time," during the drug deal and beyond. RP 150.

Ball told police the man who had bummed the cigarette was named Michael Tiller. RP 150. Ball had talked with Charlie repeatedly about the incident since it had occurred, and Charlie had told Ball that the other man involved was Tiller. RP 150. Ball was also told the other man involved was Sam Hill. RP 127.

According to Kolilis, the day of the incident, he made a phone call to Halli Hoey, believed to be Sam Hill's girlfriend. RP 78-79. Officers ultimately found her at her home and took her written statement. RP 79-80. Kolilis spent about an hour and a half with Hoey that day and searched

her car but found no physical evidence. RP 80. But the deputy would also testify over objection that police had "determined that the car - that she was the driver of the car and that the car in question was at the location," where the incident had occurred. RP 79-80. Kolilis also testified, again over objection, that Hoey's "demeanor" was that she was "really tentative, wasn't really very cooperative," and that she "appeared quite scared to really answer any questions about who was involved and who was in her car and whatnot." RP 80.

Hoey told police the incident involved "[a]n Indian male named Charlie," also known as "Jonathan Charlie." RP 80. Hoey did not recall if she had admitted to officers at first that she had driven to the boat launch for a drug deal involving meth. RP 300. And an officer testified that Hoey was "really fuzzy on the details." RP 81.

At trial, Hoey said Charlie was the boyfriend of Hoey's friend and had asked for a ride as she was leaving to drive to Oakville. RP 288. On the way to the boat ramp, she said, they saw a guy on the side of the road and Charlie asked her to pull over and give that man a ride. RP 289-90.

Hoey's car is a silver Neon, as Ball recalled, not blue, as Knapp claimed. RP 112, 302.

When the arrived at their destination, Hoey's daughter was sleeping in the back of the car and it was hot, so she stayed in the car with her child while everyone else got out. RP 291. No one else was at the ramp, so she loaned Charlie her cell phone to check on the people he was supposed to meet. RP 291. Peering into the rear view mirror, Hoey saw a truck arrive a few minutes later and two men get out. RP 292-93.

Hoey said the two men who arrived looked "high out of their mind." RP 312. Hoey grew up around "tweakers," including her mom. RP 312. She opined that the two guys who arrived looked scary. 312-13.

According to Hoey, Charlie started talking and the men were soon all getting louder. RP 293. Hoey thought Charlie and one man started yelling at each other first, kind up "in each other's faces." RP 313. After a moment, it seemed everyone was yelling about "money or drugs that they had owed him or whatever." RP 293. It woke up Hoey's daughter. RP 294.

Hoey said she saw the man later identified as Knapp get out of the truck with a knife "that went down from the waist all the way down to his knee," so at that point she "took off and got out of there" with her child and car. RP 294. But she also testified to the contrary, about spending approximately 10 minutes there with the men. RP 313.

In fact, Hoey said, she loaned one of the men her cell phone and he gave it back, then seemed to be waiting with the others behind her car for something. RP 312-13.

Hoey never saw anyone hit anyone else, never saw any bloodshed and did not see any knife wielded at all. RP 314.

Hoey testified that, after she left, she stopped and got groceries and when she got home with all her kids she had a voicemail message from police. RP 296. The next day, a bunch of officers showed up at her house and interrogated her. RP 296. Hoey said that, after speaking with them for a while, an officer wrote down what he thought had happened but when she tried to read it through briefly to see if it was correct, officers

started "screaming and yelling" at her, threatening to take her kids away. RP 296-97.

At trial, Hoey maintained that she did not know Charlie was going to do a drug deal and if she had, she "would never have took my daughter there." RP 307. She admitted knowing that people in the back room where they were before leaving for the boat ramp were smoking "meth" but claimed she herself did not do drugs, because she was in "rehab." RP 307-308.

A few minutes later, however, Hoey admitted that she had smoked marijuana that same day. RP 309. And she admitted that, in statements to police, she ultimately said she had given a ride to Charlie so he could go sell meth. RP 306. At trial, however, she claimed she did not know they were going to do a drug deal and would not have gone with her kid if she had known. RP 307.

Contrary to her testimony at trial, in her statement to officers, Hoey said that, after the incident, she actually went to her friend's house to wait for Jonathan Charlie to come back, after which she talked to him. RP 315. At trial, she maintained she did not see him but had just heard from her friend, Charlie's girlfriend, what had supposedly occurred. RP 315.

Hoey was clear that Charlie was involved in the scuffle, despite both Ball and Knapp denying that Charlie was there. RP 316. Hoey also denied asking anyone having to come jump start her car and said she knew nothing about anyone hiding in bushes. RP 310-11. Hoey did think she had seen men walking down to the water a few times while they waited, but remembered someone asking for a cigarette and seeing someone

smoking. RP 310-312.

Hoey said she did not know the name of the man they picked up who was also involved. RP 317. An officer who interviewed her said that he had "merely asked if she knew who the other person was and she indicated that she had been introduced to him." RP 337. Over defense objection, the officer testified that Hoey had told officers that someone had said the guy she had picked up was named Anthony. RP 320.

Hoey denied anyone having to come jump start her car. RP 310. She knew nothing about anyone hiding in bushes, she avowed, and never saw anyone jump out. RP 310-311. She thought the men might have walked down to the water a few times while they waited, however, and remembered someone asking for a cigarette and seeing someone smoking a cigarette. RP 311-312.

Peterson described making several photographic "montages" to show to witnesses several months later. RP 92. Ball recalled being shown a photo "montage" in which he selected a photo he said showed the man who he thought had the baseball bat that day. RP 133. In court, he identified that man, who was named Anthony Moretti. RP 133.

Despite earlier having told police it was another man based on what he had been told, Ball said he had been "pretty sure" when he made the identification, months after the incident. RP 133. Since then, he said, he had become "[r]eally sure" of the identification. RP 133-34. He boasted that, when he made the identification, it didn't take him "long at all." RP 133. And he admitted he had spent time talking to others about who was involved and had been told Moretti's name. RP 133, 151. An

officer was allowed to say that, when Ball saw the montage he seemed "[v]ery certain" and said "he would never forget it." RP 284.

Ball himself had prior convictions, including a burglary he committed after this incident. RP 146.

Ball wears glasses. RP 137. Without his glasses, his vision is "[h]orrible" and he cannot see very well. RP 137. At trial, without his glasses, he could not see the face of a detective who sat at the prosecutor's table. RP 137. When asked if he was wearing his glasses at the time of the incident, he said he was "pretty sure" he was. RP 149.

Ball was never shown a montage with a photo of Jonathan Charlie. RP 146. Ball said he would have recognized him, because he knows Charlie, and that Charlie was not at the boat launch that day. RP 146.

When Knapp was later shown a photographic montage, he wrote on the photo, "[t]his guy looks **most** like the other guy who attacked me." RP 189-90 (emphasis added). The man he identified was Anthony Moretti. RP 154-56, 189-90. In the courtroom, Knapp pointed to Moretti when asked if he recognized anyone, saying first he and Moretti got into a fight but then that Moretti was involved in the assault. RP 155.

At trial, Knapp did not recall previously testifying under oath that he was bad with faces. RP 190-91. He also did not remember admitting that his recollection of what happened "ain't clear." RP 193-94. Instead, he maintained, he recalled the incident and the day "[g]ood enough." RP 191. On redirect examination, he said he would remember Moretti's face in particular because he attacked him and that he would naturally be "a

little fuzzy" after he was hit in the head "about ten times." RP 194-95. And Knapp was confident in his identification of Moretti as involved because he picked Moretti's picture out of the six pictures Knapp was shown. RP 174.

Like Ball, Knapp, too, needs vision correction to be able to see clearly. RP 175. He had contacts in during the incident and identification. RP 174.

When he was arrested, Knapp had several knives in his possession. RP 44-45. One was a sheath knife and one was a "swing open style" knife. RP 45.

Peterson described officers looking for and ultimately locating Moretti and making arrangements to interview him. RP 252. Mr. Moretti denied any knowledge of or involvement in the attack, and also denied knowing Hill. RP 252-53. He was subsequently arrested.

D. ARGUMENT

1. ADMISSION OF EXTREMELY PREJUDICIAL EVIDENCE, THE IMPROPER OPINION TESTIMONY AND THE FLAGRANT, REPEATED MISCONDUCT DEPRIVED APPELLANT OF A FAIR TRIAL; COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Both the state and federal constitutions guarantee the right to trial by jury, which includes the right to have the jury serve as the sole judge of the weight and credibility to give evidence and testimony at trial. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth Amend.; Art. 1, § 21; Blakely v. Washington, 542 U.S. 296, 300-301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). It is prosecutorial misconduct for a state's attorney to either elicit or exploit improper opinion testimony at

trial. Because a prosecutor enjoys special status as a "quasi-judicial" officer, in general jurors give the her words and deeds special weight. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); see also, State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). As a result, prosecutorial misconduct may deprive the accused of their due process rights to a fair trial by an impartial jury. See State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2001); see Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

In this case, appellant was deprived of his rights to a fair trial before an impartial jury in multiple ways. First, the prosecutor repeatedly elicited highly improper and prejudicial evidence over objection which so denied a fair trial that it was error for the court below to deny a mistrial. In addition, the prosecutor repeatedly introduced improper opinion testimony from officers regarding appellant's guilt, credibility and veracity and the credibility and veracity of crucial state's witnesses. Further, the prosecutor committed serious, flagrant, ill-intentioned and prejudicial misconduct in eliciting and then exploiting those opinions, as well as trying to inject improper matters into trial over sustained objection, misstating the law and shifting a burden of proof to appellant and flagrantly bolstering its witnesses throughout. The result was appellant was denied the fundamentally fair proceeding to which he was constitutionally entitled. And because of counsel's unprofessional failures, he was deprived of

ineffective assistance as well.

a. Persistent efforts to introduce irrelevant, extremely prejudicial evidence and opinion bear fruit

1) Relevant facts

With the very first witness called, Detective Peterson, the prosecutor was discussing the investigation and asked whether Jonathan Charlie had been "eliminated at some point" as a suspect, and the following exchange occurred:

[DETECTIVE]:	I - early on in the investigation, I believe it was approximately five days after the incident took place, we were able to - or **there were three persons who identified the defendant as the person that was** - -
[COUNSEL]:	I'm going to object as to hearsay, Your Honor. And also whether - I think we're going to an area we need to discuss outside the presence of the jury.

RP 93 (emphasis added). The court sustained the objection, "for now." RP 93.

A little later, after having Detective Peterson identify Moretti in court as someone the officer recognized "from his investigation" of the incident, the following exchange occurred:

[PROSECUTOR]:	And do you know him by name as well?
[DETECTIVE]:	Yes. Anthony Moretti.
Q:	**And had you had any dealings with Mr. Moretti prior to any contact you had during your investigation**?
[COUNSEL]:	Objection. Relevance, Your Honor.
THE COURT:	Sustained. Rephrase.

[PROSECUTOR]: I'll get to that later as to how you identified to him.

RP 210 (emphasis added).

A short time later, the prosecutor asked Detective Peterson to name the people police had "developed as a[] person of interest or suspects" at the start of the investigation, establishing that the police started with Sam Hill, based on Knapp's having identified him and known him from before. RP 217-18. The prosecutor then went into the deputy's interrogation of Hill, and the following exchange then occurred:

[PROSECUTOR]: And what information did you obtain from him as far as a statement or information about his involvement?

[COUNSEL]: And I'm going to object as to hearsay, Your Honor.

THE COURT: Sustained.

[PROSECUTOR]: Your Honor, it's **co-defendant, co-conspirator in this case.**

[COUNSEL]: I object, Your Honor. I object and I think we should have the jury taken out.

RP 218 (emphasis added). With the jury out, counsel moved for a mistrial, noting the prosecutor had just called Sam Hill Mr. Moretti's "co-defendant" and "we can't unring the bell." RP 219. In the alternative, counsel asked to be able to tell the jury that Hill had been tried and acquitted, because the prosecutor had also just "opened the door." RP 219.

The judge then asked about prejudice:

> I'm debating in my mind whether there's any real - I mean it's clear that the testimony of both of - of Mr. Knapp and Tyson Ball was that they were attacked by two men. And it's clearly been

> established that the other attacker was a Samuel Hill and that he was identified that Mr. Knapp knew him, that he had known him for a long time, that he - right away everybody knew that this Mr. Hill was involved. So I don't know what the prejudice is by saying there was a codefendant.

RP 220. A moment later, the court again said it was having trouble with finding "prejudice by the mention of co-defendant when it's been coming in loud and clear that there are two actors and one was clearly Mr. Samuel Hill." RP 221-22.

The court declined to allow the prosecution to have the officer testify about the statement Hill had made to police, because that statement was not made in furtherance of the conspiracy, bringing it up before Hill testified would raised confrontation clause and a "whole bunch of issues," the prosecution had not given proper notice and the prosecution was improperly trying to introduce evidence without having everyone have sufficient time to brief issues and ensure a proper ruling. RP 227.

Despite the court's ruling, again the prosecutor asked to be allowed to have the officer say that he learned from Hill that Hoey was involved, "just for the completeness of the investigation." RP 227-28. The court refused, agreeing with counsel that the prosecution was "just trying to get around the hearsay rule." RP 228-29.

But with the jury back in, the following exchange then occurred:

[PROSECUTOR]:	And so what happened next in the investigation?
[OFFICER]:	We attempted to identify the other persons that had been involved in this attack.
Q:	Okay. Were you able to do that and who did you identify?

[COUNSEL]: I'm going to object, Your Honor. It calls for hearsay.

THE COURT: Overruled.

[PROSECUTOR]: Go ahead.

[OFFICER]: **We were able to identify a female named Halli Hoey who was acquainted with Mr. Hill.** And we also were able to identify another person named Jon, who we later learned was Jonathan Charlie.

Q: And what information did you have as to what Ms. Hoey's role was in the incident?

RP 233 (emphasis added). At that point, counsel's objection was sustained. RP 233.

A moment later, the prosecutor asked the officer to opine, regarding the physical description of Charlie, "how was that description important to the investigation?" RP 234. Counsel's objection was sustained. RP 234. The prosecutor then asked the officer, who had interviewed both Ball and Knapp, "what differences, if any, were there between Mr. Knapp's version of events and Mr. Ball's version?" RP 236. Again, counsel's objection was sustained. The following exchange then occurred:

[PROSECUTOR]: And what information that matched the evidence that you had collected up to this point in the investigation?

[OFFICER]: As far as the knife that we took off of Mr. Hill that was mentioned, the portion of the bat being broken that was also mentioned, the blood, the taking off from the boat launch, the persons, the descriptions and the person that was named, Samuel Hill.

[COUNSEL]: Your Honor, this is all hearsay. I don't

know what the State's doing here.

THE COURT: Sustained. Disregard what is coming from hearsay, I believe.

[PROSECUTOR]: And after speaking with Mr. Ball and getting his statement, what other suspects or persons of interest were developed as a result of that information?

[COUNSEL]: And again, that calls for hearsay as a basis, Your Honor.

THE COURT: Sustained.

[PROSECUTOR]: What happened in the investigation after that point?

[OFFICER]: **We inevitably identified Mr. Moretti as a - -**

[COUNSEL]: Objection. That's - the basis of all of this is hearsay, Your Honor.

THE COURT: Sustained.

RP 236-37 (emphasis added).

2) The evidence was extremely prejudicial, inadmissible hearsay and reversal is required

The introduction of this evidence over defense objection is highly improper and compels reversal. First, the court should have granted a mistrial after the prosecution referred to Hill - identified by an eyewitness who knew him as one of the perpetrators - as a codefendant and coconspirator of Moretti. A mistrial should be granted based on the introduction of evidence if the evidence may have affected the outcome of the trial and thus denied the defendant his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In determining whether a

trial irregularity has had this impact, the reviewing court looks at 1) the seriousness of the irregularity, 2) whether it involved cumulative evidence, and 3) whether a curative instruction was capable of curing the irregularity. See State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

In looking at those factors here, reversal and remand for a new trial is required. First, there can be no question that the irregularity was serious. A juror could not fail to be aware that the prosecution believed Hill and Moretti were equally involved and in fact "coconspirators" and codefendants. Second, at the time it was elicited the testimony was not cumulative. Third, a curative instruction could not have helped "unring" the bell. The jury heard the defendant linked by the prosecutor as a "codefendant" with the only person known to have been involved in the crimes because that person was identified by the victim, who knew him.

In addition, it is highly troubling that a prosecutor would deliberately ask in a trial with such an extreme sentence at risk whether an officer knew the defendant before the investigation in this case. The only implication a jury could draw was that the defendant had prior contacts with and was known to police. There was no relevance to the evidence except to prove improper character or propensity. And the impropriety of asking such a question should have been very clear.

As if the admission of this evidence and the misconduct were not enough, the prosecutor repeatedly elicited improper opinion testimony, then engaged in improper bolstering and misstated the law and the jury's role multiple times.

b. Introduction and exploitation of improper opinion testimony which included bolstering

1) Relevant facts

At trial, the prosecutor asked Deputy Sheriff Cowsert about Knapp's injuries and the officer described them, then stated his opinion that Knapp "appeared he had been in an assault." RP 40-41. The prosecutor asked the officer about photos the officer had taken of the top side of Knapp's hands and the officer said he was looking for "wounds on his hands that would be consistent with self defense or being a primary aggressor, making sure there's no knife wounds or anything else on his hands." RP 43-44. The photos were shown and the officer then described one as "showing that there's no blood or evidence that they were used in the assault as far as coming in contact with any blood or tissue." RP 44-45. Counsel did not object.

The prosecutor asked the officer to comment on the photos of Knapp's hands, which he took "to have that evidence of possible self defense." RP 48-49. The officer responded that Knapp had swelling on his arms and his hands, which the officer said would have been consistent with "[b]eing struck with a blunt object." RP 48-49.

The prosecutor then again referred to the photo of Knapp's hands, saying to the officer, "you had indicated you were taking the photos to -to show whether or not there had been some defensive or some aggressive kinds of maneuvers." RP 49. The prosecutor next asked about the officer's opinion about Knapp's injury on the arm, "how did you - what did you take that to mean?" RP 49. The officer declared he "viewed that

as a defensive type injury." RP 49. The prosecutor repeated, "again, you're taking these photos both to see if there had been aggressive or defensive motions by this person," then asked the officer, "[d]id you see any of the - anything that would have indicated aggressive?" RP 49. The officer said he had not. RP 49. Counsel did not object.

At trial, when Knapp admitted he had decided not to tell police about the incident stemming from a drug deal at first, the prosecutor repeatedly tried to suggest to Knapp that he should claim his memory was challenged due to the incident, with the following exchange:

[PROSECUTOR]:	. . .Okay. And just to go back on - right after the attach, was there anything that was affecting maybe your memory of - - of what had happened or on that day after the attack itself?
[KNAPP]:	No.
Q:	**Anything about your injuries or being afraid?**
A:	Restate that question, please.
Q:	Sure. You initially made a statement to the officers. Could there have been anything affecting your ability to remember every detail at that moment?
A:	No.
Q:	No. **Not the fact that you were injured or - or having just been attacked?**
A:	No, not at the time.
Q:	Not at the time. Okay.

RP 176 (emphasis added).

Both Cowsert and Peterson were allowed to testify about Knapp's

"demeanor" when interrogated by police and what they thought it meant. RP 48, 214. Cowsert opined that Knapp was "getting to a point where he just wanted to leave," to "go to the hospital and get himself taken care of." RP 48. The prosecutor also asked Peterson what Knapp's demeanor "indicate[d]" to the officer, who then declared, "I think he was just reluctant to take care of this with the police" and "[h]e didn't want to stay any longer than he had to." RP 214. Peterson also declared, regarding Knapp, "I think he was somewhat stunned by being beaten about the head, **but he still seemed like he remembered what had happened and give a pretty good description of the events and people**." RP 216 (emphasis added). Although the changes in Knapp's versions of events was the fundamental issue for the defense, counsel did not object. RP 216.

A little later, the prosecutor concluded the questioning of Deputy Peterson at length, then concluded with the following exchange:

> [PROSECUTOR]: And other than Mr. Hill and the defendant, who else was suspected fo be involved in the actual robbery and assault of Mr. Ball and Mr. Knapp?
>
> [DEPUTY]: **In the actual assault and robbery, no one else.**

RP 256 (emphasis added). Later, in rebuttal closing argument, the prosecutor reminded the jury that he had asked Detective Peterson "specifically who else besides Mr. Sam Hill and Mr. Anthony Moretti are the suspects in the assault and robbery? No one. No one." RP 402.

2) <u>This was all improper opinion testimony and bolstering</u>

All of this was improper opinion testimony and much of it was also

misconduct because it amounted to improper bolstering. An opinion is something "based on one's own belief or idea, rather than on direct knowledge of the facts at issue." Demery, 144 Wn.2d at 760. In general, it is not necessarily improper for a witness to give his opinion on an "ultimate fact," if it is otherwise admissible. See ER 704; see also State v. Kirkman, 159 Wn.2d 981, 927, 155 P.3d 125 (2007).

But no witness may testify about his opinion as to the guilt of the defendant, or his veracity and credibility, or that of other witnesses at trial. See State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). Improper opinion testimony violates the right to trial by jury but also invades the jury's fact-finding province. See State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

Thus, the Supreme Court found improper opinion testimony when an expert in a rape case testified that the victim suffered from "rape trauma syndrome," as it amounted to his opinion that she had been raped, a disputed issue at trial. State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987). Similarly, it was improper opinion testimony when an officer testified that a tracking dog had followed the defendant's "fresh guilt scent." State v. Carlin, 40 Wn. App. 698, 700, 700 P.2d 323 (1985), disapproved in part and on other grounds by Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993).

In general, if counsel objects below, the reviewing court will look for even inferential opinion testimony. Kirkman, 159 Wn.2d at 937. If counsel fails to object, however, the court will address it as "manifest constitutional error," only if it is established that there was "an explicit or

almost explicit statement" as to guilt, veracity or credibility. 159 Wn.2d at 937. To determine if it meets these standards, the reviewing court looks at the type of witness involved, the nature of the testimony, the nature of the charges, the nature of the defense and the other evidence before the trier of fact. Demery, 144 Wn.2d at 759.

Here, taking the comments in light of the Demery factors, the testimony was all explicit or near-explicit opinion on guilt, veracity or credibility. First, all but one or two of the witnesses were officers, whose badge of respect in the community means the their testimony can have "a special aura of reliability," that holds strong sway with the jury. See Kirkman, 159 Wn.2d at 928. Second, the nature of the testimony was extremely damaging, going directly to the crucial issues in this case. The officers were repeatedly allowed to testify about what evidence "meant" as far as the credibility of the witnesses or guilt of the defendant was involved. But that is not the purview of a witness; it is solely for the jury to decide.

Most egregious, these comments were all designed to ensure that the jury knew that police and prosecutors believed in Moretti's guilt. It is completely irrelevant whether police thought "no one" but Moretti and Hill were suspects in the assault and robbery. Further, it clearly conveyed that improper opinion to the jury - again and again. And the prosecutor then exploited that evidence in arguing guilt.

The nature of the charges and defense and other evidence further establish that the testimony was direct or nearly direct opinion testimony under Kirkman. The charges were of assault and robbery, and there were

serious questions about the fact that the witnesses who were pointing to Moretti as being involved were all on drugs or alcohol and gave such very different versions of the events. The defense was denial and credibility of the state's witnesses; in point of fact, that Knapp was lying about what happened and Moretti was actually not involved. All of this improper opinion went directly to the crucial issues in this case. Because it was all direct or near direct comment on guilt, veracity or credibility, and further amounted to improper bolstering, appellant was denied his constitutionally protected right to a fair trial.

Reversal is required. Admission of improper opinion testimony is constitutional error which the prosecution must prove harmless, beyond a reasonable doubt. Kirkman, 159 Wn.2d at 928. Constitutional error is presumed prejudicial and reversal is required unless and until the prosecutor proves, beyond a reasonable doubt, that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986). A constitutional error is not "harmless" unless the Court can find, beyond a reasonable doubt, that the untainted evidence of guilt is so overwhelming that it necessarily leads to a conclusion of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

This Court must assume that the damaging potential of the improperly admitted evidence was "fully realized," in making its determination on this issue. See State v. Moses, 109 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006). Put another way, a constitutional error will compel reversal under the presumption of

prejudice unless and until the prosecution can prove, beyond a reasonable doubt, that any and every reasonable jury would have convicted even without the error, so that the Court is willing to deem something as serious as the violation of a defendant's constitutional rights "harmless." Guloy, 104 Wn.2d at 425.

This standard is far different than the deferential standard used in cases where the issue is sufficiency of the evidence. See State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). In those cases, this Court will affirm unless *no* reasonable jury could have convicted, taking the evidence in the light most favorable to the state. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In stark contrast, where, as here, the constitutional harmless error test applies, the Court is *required* to "reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder's decision to convict." Easter, 130 Wn.2d at 242.

This distinction is crucial because it highlights the incredibly high burden of proof the prosecution must satisfy before a constitutional error can be dismissed as "harmless." Romero, supra, is instructive. In Romero, the defendant was charged with first-degree unlawful possession of a firearm in an incident where there was a report of shots fired at a mobile home park in the middle of the night. 113 Wn. App. at 783. An officer using a flashlight who responded saw Romero coming around the front of a mobile home holding his right hand behind his body. Id. When

the officer demanded that Romero show his hands, Romero refused and would not step away from the mobile home, instead running around it and later being found inside. 113 Wn. App. at 783.

In addition, officers found a shotgun inside the mobile home where Mr. Romero was hiding and shell casings on the ground next to the mobile home's front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Mr. Romero and an eyewitness who had seen the shooter actually picked out Romero as the person seen. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive the shooter was Mr. Romero, the witness remembered seeing that man wearing a slightly different colored shirt (blue vs. grey but both "checked"). 113 Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Mr. Romero that night, when shown the shirt Mr. Romero was wearing the eyewitness identified it as the one the shooter had worn. 113 Wn. App. at 784.

On appeal, Mr. Romero challenged the sufficiency of the evidence to prove his guilt and also argued that there was a constitutional error based on an officer's comments about the defendant's failure to speak to police. Id. Regarding the sufficiency challenge, the Court applied the extremely forgiving standard of review of taking the evidence in the light most favorable to the state, whether *any* rational trier of fact could have found him guilty, even if other rational triers of fact might not. 113 Wn. App. at 784-87. The Court upheld the conviction against the sufficiency challenge.

But the same evidence that withstood the sufficiency challenge was

insufficient to satisfy the constitutional harmless error standard. 113 Wn. App. at 793. An improper comment on Romero's failure to speak to police which was neither elicited nor exploited by the prosecution had been found to be constitutional error. 113 Wn. App. at 793. Although there was significant evidence of Romero's guilt, that was not sufficient to amount to "overwhelming" evidence of guilt in order to find the constitutional error harmless. 113 Wn. App. at 795-96. Indeed, the Romero Court held, because the evidence was disputed, the jury was "[p]resented with a credibility contest," and "could have been swayed" by the sergeant's comment, "which insinuated that Mr. Romero was hiding his guilt." 113 Wn. App. at 795-96.

Romero illustrates that the determination of whether constitutional error is harmless is especially affected by issues of credibility at trial; see also, State v. Keene, 86 Wn. App. 589, 594-95, 938 P.2d 839 (1997) (child sex abuse case where there is strong evidence of guilt, because there was also conflicting evidence, even strong evidence was not "so overwhelming" that it "necessarily" leads to a finding of guilt).

The prosecution cannot meet that burden in this case. The evidence that appellant was one of the assailants is based upon the credibility of identifications made by state's witnesses who admitted they lied repeatedly to police, were under the influence and gave very different versions of events. That is far from "overwhelming" proof of appellant's guilt which would have compelled every juror who heard the untainted evidence to convict.

Even if the improper opinion testimony was not direct or near-direct, reversal would still be required based on counsel's ineffectiveness in sitting mute while this extremely prejudicial evidence and opinion testimony was elicited and then exploited at trial. To understand the depth of ineffectiveness and the gravity of the situation, however, it is necessary to discuss the last significant type of misconduct committed in this case.

c. Further misconduct

1) Relevant facts

In closing argument, the prosecutor began by reminding the jurors that the defense had said, in opening statement, "nothing is a given in this case." RP 384. The prosecutor then used that theme throughout, describing as "givens" that Knapp had money and

> These guys knew it. They wanted that money. They set him up, met him in a secluded area, at least two of them. They were both armed. Those are a given. Mr. Knapp was attacked. Mr. Ball was attacked. Those are given. You've seen the injuries. There's no doubt.

RP 392. The prosecutor then said that there was "no evidence" that Ball and Knapp "started anything," "[t]hey just showed up and they got rolled and they got attacked, period. Those are the givens in this case." RP 393. It was a "given" that Knapp had been robbed, that it happened the way he said, and "[i]t's a given that the defendant, it doesn't matter which one, asked give me the money[.]" RP 393.

The prosecutor also declared it as a "given that Anthony Moretti was at the scene." RP 394. The prosecutor said of its witnesses that "[t]hey have no reason to point him out otherwise." RP 394. And the prosecutor said there was "no doubt" of guilt:

> In this case there's no doubt that Mr. Ball was assaulted, no doubt that Mr. Knapp was assaulted, there's no doubt that Mr. Knapp had money. There's no doubt that the men attacking him, including Anthony Moretti, were asking for it. There's no doubt that he didn't have the money when he left. There's no doubt that a bat and an ASP were used in this case and there's no doubt that those instruments can cause significant injury, can cause death, particularly in the way they were used. . .**And there's no doubt that the defendant was with Sam Hill and that he was involved in this, and there's no doubt that Mr. Moretti was the second man. And this case, Ladies and Gentlemen, there's no doubt that Mr. Moretti is guilty of all of the charges**[.]

RP 395 (emphasis added).

Regarding the serious problems with the credibility of the state's witnesses, the prosecutor also reminded the jurors that the state had "explained why these people told the story the way they did," then went on:

> And Ms. Hoey, she has her own reasons for not testifying as clearly as she did **but that doesn't give Mr. Moretti a pass. None of that does.**
>
> **The fact that you may not like him doesn't give Mr. Moretti a pass for what he did. He's clearly implicated in this case. He's clearly identified. He's clearly involved. He clearly had assaulted Mr. Ball and Mr. Knapp. He clearly robbed Mr. Knapp along with Same Hill.**
>
> In this case that's all that matters is what happened and what he did. **You shouldn't give him a pass simply because there was some misinformation initially or simply because you don't like what they were there to do.** But again, that's not what you're here for. **You're here to determine whether or not Mr. Moretti is innocent or guilty of the charges against him.**

RP 403-404 (emphasis added).

2) This further misconduct compels reversal

To understand the gravity of this further misconduct and why it compels reversal, it is crucial to look at the issues at trial. Allegedly

improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993).

There is no question that counsel are permitted "latitude to argue the facts in evidence and reasonable inferences" flowing therefrom. See State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). But a defendant has no duty to present evidence to rebut the state's case; it is the prosecution which must bear the full weight of the burden of *proving* that case in the first instance. See State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (2009). A prosecutor commits misconduct in arguing that the jury should find the defendant guilty because there was no evidence showing he was not. See State v. Fleming, 83 Wn. App. 209, 215, 921 P.3d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Once again, counsel was ineffective in sitting mute while the prosecutor's misconduct led the jury away from its proper role and duties.

Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.3d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. Counsel is ineffective despite a strong presumption to the contrary if his conduct falls below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Those standards are amply met here. Throughout trial, the prosecution elicited improper opinion testimony and committed serious flagrant misconduct. For some of it counsel objected. But for much of it Yet counsel sat mute, allowing the prosecutor's misconduct to go unchecked. If the Court finds that the misconduct does not compel reversal under the standard applicable for misconduct to which counsel has objected below, it should nevertheless reverse based on counsel's unprofessional failure to request such cures below. There could be no legitimate tactical reason to fail to object to the serious, prejudicial misconduct in this case. Reversal and remand for a new trial is required.

2. THE SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE MUST BE REVERSED

At sentencing, the judge was required by law to impose life without the possibility of parole as the "only option[.]" RP 419-20. That sentence was imposed under "Persistent Offender Accountability Act" (POAA), and it should be reversed, because it amounted to cruel and cruel and unusual punishment under Article 1, § 14 and the 8th Amendment, the procedure used to impose the sentence violated appellant's rights to trial by jury and proof beyond a reasonable doubt, and the prosecution failed to meet its burden of proving that appellant was a "persistent offender."

a. Relevant facts

The man identified by the state in this Persistent Offender proceeding as Anthony Moretti was born in April of 1983. CP 10-11 . The first alleged "strike" was a first-degree arson committed on January 19, 2004, when the defendant in that case was about 20 years old. CP 98.

At sentencing in this case, the prosecution presented only the judgment and sentence for the conviction. CP 107. That paperwork indicated that the defendant entered a plea to an amended information and, in exchange, a charge of residential burglary was dismissed. CP 107-109. The total standard range was 26-34 months and 28 months was imposed. Id.

The second alleged "strike" was a vehicular assault in Lewis County in October of 2009, again resolved by a plea, when the defendant was 26 years old and had completed only the eighth grade. CP 110. Below, the prosecution presented a copy of the information charging, *inter alia,* vehicular assault causing substantial bodily harm to another while under the influence of alcohol or intoxicants or both. CP 110-14. The Statement of Defendant on Plea of Guilty, also submitted, included a statement saying that the defendant "was under the influence of alcohol and caused substantial bodily injury to another by pulling in front of another vehicle." CP 114-21. The standard range for the offense was 13-17 months; 13 months were imposed. CP 116.

b. The structure and purpose of the POAA

The sentence of life without the possibility of parole - more honestly called "death in prison" - was unconstitutional as cruel and cruel and unusual punishment, was imposed after a procedure which violated appellant's rights to trial by jury and proof beyond a reasonable doubt and was improperly imposed despite the prosecution's failure to prove the requirements for a "persistent offender" sentence.

In 1993, our state enacted, by initiative, the first "three strikes" law in the country. See Laws of 1994, ch. 1, § 3 (Initiative Measure 593,

approved November 2, 1993); Witherspoon, 180 Wn.2d at 911 (Appendix of laws). Washington's law, called the "Persistent Offender Accountability Act" ("POAA"), was motivated by several high profile, horrific crimes, the belief that harsh sentencing would result in deterrence and, frankly, the goal of warehousing from society of that small portion of the offender population deemed to pose the very greatest danger to public safety. See Jennifer Cox Shapiro, Comment, *Life in Prison for Stealing $48?: Rethinking Second-degree Robbery as a Strike Offense in Washington State*, 34 SEATTLE U. L. REV. 935, 939-44 (2011).

Indeed, the Legislative purposes of the "Persistent Offender Accountability Act" ("POAA") reflect these goals, seeking not only to "[r]estore public trust in our criminal justice system" but also to improve "public safety by placing the most dangerous criminals in prison," reduce the number of serious, repeat offenders by "tougher sentencing" and to set "proper and simplified sentencing practices" victims and "persistent offenders" can understand. See Laws of 1994, ch. 1, § 2; RCW 9.94A.555.

The POAA is codified in several sections of the Sentencing Reform Act, Title 9 RCW. Under RCW 9.94A.505, a sentencing court "shall impose" a sentence "as provided" in the specific sections of the statute, including, under RCW 9.94A.505(2)(a)(iii), "RCW 9.94A.570, relating to persistent offenders." RCW 9.94A.570 provides the sentencing mechanism itself, declaring that, "[n]otwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent

offender shall be sentenced to a term of total confinement for life without the possibility of release."

Thus, RCW 9.94A.570 and RCW 9.94A.505 operate together to both mandate that the prosecution meets the burden of proving that the person in question is a "Persistent Offender" and set forth what must be proved. The definition of "persistent offender" is contained in RCW 9.94A.030,[10] and provides in relevant part as follows:

> "Persistent offender" is an offender who:
>
> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and
>
> (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525, provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any other of the most serious offenses for which the offender was previously convicted[.]

Former RCW 9.94A.030(37)(2015).

The terms used in defining the term "persistent offender" have themselves been defined and further refine the prosecution's burden of proving a defendant has "persistent offender" status. For example, a person is defined as an offender for the purpose of the POAA if they "committed a felony established by law" and are either 18 years of age or older or under that age but were appropriately transferred to adult court

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[10]Because RCW 9.94.030 is the definitional statute for the SRA, the specific subsection number for the definition of "persistent offender" changes with the statute's frequent amendments. See, e.g., Laws of 2015, ch. 287, § 1 (from 37 to 38 due to new subsection). At the time of the sentencing in this case, the subsection was numbered (37).

jurisdiction. State v. Knippling,166 Wn.2d 93, 99, 206 P.3d 332 (2009), (quoting, RCW 9.94A.030). "Most serious offense" is also defined, and now means any class A felony, criminal solicitation, attempt or conspiracy to commit such a felony, as well as assault in the second degree, a class B felony with a finding of sexual motivation, any felony with a deadly weapon verdict, and vehicular assault, "when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner." Former RCW 9.94A.030(33) (2015).

The prosecution has a burden of proving not just the existence of two prior convictions for a "most serious offense" but also the chronology of events surrounding the defendant's criminal history. To establish that a person is a persistent offender under the "three strikes" provision, the state has to prove he was "convicted as an offender on two prior and *separate* occasions." Knippling, 166 Wn.2d at 100 (emphasis added). Thus, to meet its burden of proving that the sentencing court should find the defendant to be a "[p]ersistent offender," the prosecution must show

> 1) the person is an "offender" for the current offense;
>
> 2) the current offense of conviction meets the definition of a "most serious offense;"
>
> 3) the person has at least two prior convictions as an "offender;"
>
> 4) those prior convictions were for offenses which would be considered "most serious offenses" in this state;
>
> 5) those prior convictions had not "washed out" and would still be counted in the offender score under RCW 9.94A.525;
>
> 6) those prior qualifying convictions occurred on "at least two separate occasions;" and

> 7) at least one of the two previous convictions occurred before any other prior "most serious offense" was committed, not the date on which the conviction itself occurred.

See RCW 9.94A.030(37).

In this case, the court imposed a POAA sentence. The imposition of such punishment - recognized by the U.S. Supreme Court as second only to death in severity - violates the proportionality requirements of the state and federal constitution in this case. Further, the procedure used is in violation of the rights to trial by jury and proof beyond a reasonable doubt. Finally, even if the sentence could be constitutionally imposed, the prosecution failed to meet its burden of proof for a POAA sentence in this case.

c. The proportionality requirements of the Eighth Amendment and Article 1, § 14

The Eighth Amendment prohibits punishment which is "cruel and unusual," but our constitution protects more. See State v. Fain, 94 Wn.2d 387, 396, 617 P.2d 720 (1980). Article 1, § 14, prohibits punishment which is "cruel" even if it is not "unusual." See State v. Roberts, 142 Wn.2d 471, 505-506, 14 P.3d 713 (2000). As a result, in the past, our state supreme court has struck down as "cruel" a sentence under our old "habitual offender" scheme for three relatively minor offenses, even though the U.S. Supreme Court had previously upheld a similar sentence against an 8th Amendment challenge. Fain, 94 Wn.2d at 402.

The Fain Court held that our state's "cruel punishment" clause must be interpreted consistent with the "evolving standards of decency" of our "maturing society," and that any punishment imposed must be

proportional. Fain, 94 Wn.2d at 396. The Court recognized that, in addition to meeting standards of decency in general, punishment must also be "commensurate with the crimes" for which it is imposed. Fain, 94 Wn.2d at 396. But the analysis in Fain, adopted in 1980, is no longer sufficient to satisfy our state constitution or the Eighth Amendment under subsequent developments in the law.

The principle that punishment must be proportional to the crime is deeply rooted in our jurisprudence. See Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910) (recognizing a sentence may be "so disproportionate to the offense as to constitute a cruel and unusual punishment"); Robinson v. California, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) (90 day sentence was disproportionate and thus "cruel and unusual," because it punished addiction and "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold").

The U.S. Supreme Court has previously applied a "proportionality" analysis to the Eighth Amendment and the question of a habitual offender sentence of life without parole for uttering a "no account" check. Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). The Solem Court set forth three "objective" factors for "proportionality" in relation to the crime: 1) the gravity of the offense and the harshness of the penalty, 2) the sentences imposed for other crimes in the jurisdiction, and 3) the sentences imposed for the same crimes in other jurisdictions. 463 U.S. at 280. The Solem analysis is only slightly different from the one adopted in Fain, which looks at 1) the nature of the offense, 2) the legislative purpose

behind the statute, 3) the punishment which would be imposed for the same crime in other jurisdictions and 4) sentences imposed for the same crime. See Fain, 94 Wn.2d at 397. Indeed, although the Fain Court held that our state's constitution provides greater protection than that provided by the Eighth Amendment, the Fain analysis adds an extra layer which appears to provide *less* protection, by giving consideration to the legislative purpose behind the statute in determining "proportionality."

After Solem, however, a closely divided Court departed from proportionality analysis of the past. See Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). In Harmelin, the majority upheld life without parole for possession of a large quantity of cocaine, declaring that the Eighth Amendment contains a "narrow" proportionality principle which does not require proportionality between crime and sentence but just prohibits extreme sentences which are "grossly disproportionate" to the crime. Another closely divided Court then explicitly rejected the three part test of Solem and further - starkly - declared that the Eighth Amendment "contains no proportionality guarantee." Ewing v. California, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003); see Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (Eighth Amendment "gross disproportionality principle" did not apply except to the most extraordinary case).

As one commentator noted, the confusion of the law on the Eighth Amendment and "proportionality" during this time was strong. Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme*

Court's Tortured Approach to Cruel and Unusual Punishment, 84 KY. L. J. 107 (1996).

At the same time, however, a different line of Eighth Amendment jurisprudence was evolving, as the Court struck down punishments previously upheld based upon our country's evolving standards of decency and the mandate of proportionality. In 1989, the Court had found no national consensus against a sentence of death for those developmentally disabled at the time of trial; in 2002, the Court found that imposing the punishment of death on someone who was developmentally disabled was disproportionate under the Eighth Amendment, because of the characteristics of the *offender* (i.e., developmental disability), not the offense. See Atkins v. Virginia, 536 U.S. 304, 314, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

The Court's recognition that characteristics of the defendant should also be part of the proportionality analysis of the Eighth Amendment then was extended to juveniles, and the Court struck down as categorically disproportionate imposition of death for juvenile crimes. Roper v. Simmons, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). More recently cases have found a violation of the Eighth Amendment where a punishment system makes the mitigating factors of the youth and its transient characteristics "irrelevant to the risk of the harshest prison sentence" of life without the possibility of parole. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); Montgomery v. Lousiana, __ U.S. __, 136 S. Ct. 178, 726, 193 L. Ed. 2d 599 (2016) ("[b]y making youth (and all that accompanies it) irrelevant to imposition of that

harshest prison sentence, mandatory life without parole poses too great a risk of disproportionate punishment").

Indeed, the Court held that the proportionality analysis required for death penalty cases must use two different "subsets" of analysis: "one considering the nature of the offense, the other considering the characteristics of the offender." Graham v. Florida, 560 U.S. 48, 60-61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). It adopted some "categorical" rules in relation to the second "subset," based on the shared characteristics of certain groups of offenders - striking down the death penalty for anyone who committed their crime before the age of 18 (Roper, supra), or for someone whose intellectual functioning was below a certain level (Atkins, supra), as two examples. Graham, 560 U.S. at 60-61. And in Graham, it extended the proportionality analysis of the death penalty cases into cases involving life without parole, categorically banning that punishment for non-homicide offenders. 560 U.S. at 61-62.

And our state high court similarly has begun to recognize that the defendant's age at the time of the crime is relevant to his culpability. State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) (youthfulness of adult offender can be a mitigating factor in assessing culpability).

To satisfy the Eighth Amendment and our state's constitution under these developments in the law, therefore, the standard must be more than that set forth in Fain. Eighth Amendment jurisprudence now recognizes the importance of not only proportionality relative to the crime and punishment but also the offender himself. See Miller, supra.

Further, the Eighth Amendment cases regarding juveniles have established in Eighth Amendment law the principle that life without the possibility of parole is in fact far more akin to death than any other sentence. Graham, 560 U.S. at 70. While the person ordered to serve life without parole is not technically put to death, the Supreme Court has not recognized that such a sentence "alters the offender's life by a forfeiture that is irrevocable," and deprives the defendant "of the most basic liberties without giving hope of restoration[.]" 560 U.S. at 69-70.

In State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1994), our Supreme Court applied the proportionality test adopted in 1980 in Fain, finding the POAA sentence imposed was not unconstitutionally cruel where the convictions were for first-degree robbery, first-degree kidnaping, second-degree robbery and first-degree robbery. Thorne, 129 Wn.2d at 749-50, 774. The Court recognized, however, that "there may be cases in which application of the Act's sentencing provision runs afoul of the constitutional prohibition against cruel punishment." 129 Wn.2d at 773 n. 11.

About twenty years later, in Witherspoon, supra, the majority again upheld the POAA as constitutional under the Eighth Amendment and Article 1, § 14. Witherspoon, 180 Wn.2d at 890. In reaching this conclusion, the majority looked only at the cases involving treatment of youth, concluding that the proportionality analysis used in those cases did not extend beyond that context into cases involving adults. Witherspoon, 180 Wn.2d at 890.

Witherspoon, however, was decided before O'Dell. In O'Dell, the Supreme Court found that it is proper to consider the individual characteristics of an adult who is relatively young as a potential mitigating circumstance in sentencing. O'Dell, 183 Wn.2d at 689. The Court also recognized that "the parts of the brain involved in behavior control continued to develop well into a person's 20's." 183 Wn.2d at 691-92. Indeed, the Court noted, because the brain was not fully mature at 18, or 21, but closer to 25, age was highly relevant to sentencing not just for juveniles but also for younger adults. 183 Wn.2d at 696-97. Quoting Roper, the O'Dell Court noted that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." O'Dell, 183 Wn.2d at 697 (quoting, Roper, 543 U.S. at 574).

Thus, to be sufficient under Eighth Amendment law, punishment must be proportionate not only to the crime but also to the offender and his culpability. Because that is the constitutional floor below which our state constitution may not go, our state constitutional standards must not be less protective than those of the Eighth Amendment.

Applying modified Fain factors to this case shows the POAA sentence is both cruel and cruel and unusual punishment. Appellant was just 20 years old when he committed the first predicate crime. At that age, as recognized in O'Dell, his mental and emotional development had not yet completed, as the transient qualities of youth recognized in that case do not end until the mid-20s. 183 Wn.2d at 697. Yet there was no consideration of whether the mitigating factors of youth affected

appellant's culpability for that offense before it was used to support sending appellant to die in prison.

Further, here, looking at the nature of the offenses, there is a staggering difference between the severity and sentences of the prior crimes and the sentence of life without the possibility of parole. For the arson, the sentence was 28 months, and only 13 months was ordered on the vehicular assault. In this case, the standard range would have been a sentence of 129-171 months for the robbery and 63-84 months for the assault. To go from a sentence of a few years to a sentence of more than 10 is a significant increase but does not shock the conscience. Going from a few years to life with no hope of parole does. Appellant has never served as much time as he would have under a standard range sentence in this case. But with the POAA, he has gone from relatively mild sentences to the second most severe sentence possible - and serving the same sentence as defendant convicted of multiple counts of aggravated murder. See, e.g., RCW 10.95.030(1).

The nature of the offenses is also significant. There is no question that there were injuries and that this was a serious case involving serious felonies. But those felonies are not the worst felonies possible, nor were they committed in the worst possible ways. The assault, while serious, did not inflict extreme and substantial long lasting injury and lasted only as long as required for the robbery. This is not a case involving gratuitous violence, or torture or anything similar. Nor was there a large sum of money taken.

The prior offenses were even more minimal. There is no evidence that there was death or anything similar for the arson or vehicular homicide. Again, while the crimes were clearly felonies, they are not the kinds of crimes which show appellant to be particularly dangerous relative to other felons. Yet the POAA was intended to put "the most dangerous criminals in prison." See Laws of 1994, ch. 1, § 2.

For a sentence of life without parole to be imposed based on strike crimes which include which occurred when the defendant was not yet fully adult, when he retained the mitigating factors of youth, and to impose such a sentence which is so disproportionate to the sentences the appellant has faced in the past runs afoul of the 8th Amendment and Article 1, § 14. This Court should so hold.

d. The state and federal rights to trial by jury and proof beyond a reasonable doubt apply and the narrow "prior conviction" exception does not

Even if imposing a POAA sentence in this case was not cruel and cruel and unusual punishment, reversal would still be required, because the procedure used to establish whether a POAA sentence should be imposed improperly deprives the defendant of his rights to trial by jury and proof beyond a reasonable doubt.

Under the state and federal constitutions, the accused have the right to have a jury decide any fact which increases the penalty for a crime, with the burden on the prosecution to prove that fact beyond a reasonable doubt. See Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005); Sixth Amend.; 14th Amend.; Art. 1, § 21. In 1998, however, the U.S.

Supreme Court recognized an "exceptional departure" from this "historic practice:" - "the fact of a prior conviction." See Almendarez-Torres, supra. Almendarez-Torres involved an "alien" who returned to the country illegally after having previously being deported following conviction of an aggravated felony. 523 U.S. at 226. Returning without special permission but without such a conviction resulted in a prison term of up to 2 years. Id. Returning after being deported "subsequent to a conviction for commission of an aggravated felony" led to a prison term of up to 20 years. Id. The defendant stipulated not only to the fact that he had been deported and entered unlawfully but *also* that his previous deportation had been "pursuant to" three earlier convictions for "aggravated felonies." 523 U.S. at 227.

In holding that the Sixth Amendment rights and proof beyond a reasonable doubt did not apply, the Almendarez-Torres majority declared that the fact that a prior crime had been committed - effectively criminal history - is "as typical a sentencing factor as one might imagine." Id. The Court reached this conclusion in large part because it was still constitutionally permissible for a judge rather than a jury "to determine the existence of factors that can make a defendant eligible for the death penalty." Id.

Other than the narrow exception for the "fact of a prior conviction," "any fact that increases the penalty for the crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

The validity of the exception in Almendarez-Torres has been roundly questioned for years. See Apprendi, 530 U.S. at 488-89; Shepard v. United States, 544 U.S. 13, 27-28, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring) ("a majority of the Court now recognizes that Almendarez-Torres was wrongly decided). Indeed, one Justice has declared, "innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres. Shepard, 544 U.S. at 29. The Apprendi Court also noted that the holding in Almendarez-Torres was limited, because the defendant in Almendarez-Torres had conceded the relevant facts regarding his prior convictions, which "mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." Apprendi, 530 U.S. at 488.

It seems patently clear that Almendarez-Torres will soon be completely overruled. Just a few months ago, the U.S. Supreme Court reversed the death penalty caselaw upon which Almendarez-Torres had largely relied. See Almendarez-Torres, __ U.S. __, citing, Hildwin v. Florida, 490 U.S. 639, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), overruled, Hurst v. Florida, __ U.S. __, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), and Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1980), overruled, Hurst, 136 S. Ct. at 617. In Hurst, the Court struck down the Florida death penalty law, finding that law violated the Sixth Amendment right to trial by jury - even though the Court had repeatedly upheld the law against such challenges in Hildwin and Spaziano. Hurst, 136 S. Ct. at 618. In that scheme, the jury made an

"advisory sentence" of life or death after an evidentiary hearing and the judge then weighed the aggravating and mitigating factors and decided whether to impose a sentence of either life in prison or death. Hurst, 136 S. Ct. at 620. Because the statutory scheme did not make a defendant eligible for death until there were "findings by the court" that death should be the punishment, it violated the Sixth Amendment. Id. Put plainly, the Court said, "[t]ime and subsequent cases have washed away" the logic which had held that such a system was constitutionally proper under the Sixth Amendment. 136 S. Ct. at 247.

It is not necessary for this Court to wait for the inevitable ruling finally striking down Almendarez-Torres to grant relief to appellant in this case, because the prosecution is required to prove facts which far exceed the limits of the "prior conviction" exception in order to support a sentence under the POAA. The existing cases already show that the "prior conviction" exception is extremely narrow and limited only to the fact of the existence of the prior conviction, not facts relating to that conviction. The Court presaged its recent rulings in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). In Ring, the Court cautioned against relying on statutory labels to determine constitutional rights, stating, "[i]f a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." 536 U.S. at 602. Then, in Blakely, the Court overturned our state's highest court, which had upheld our exceptional sentencing scheme against a Sixth Amendment challenge. 542 U.S. at 305-306. In that scheme, the

sentencing court could exceed the presumptive sentence which would have been imposed based solely on the verdict of the jury, if that court found aggravating factors by a preponderance of the evidence to support a higher term. 542 U.S. at 306. The U.S. Supreme Court held that the jury trial right and proof beyond a reasonable doubt apply to any increase above the maximum sentence which can be imposed based solely upon the jury's verdicts, not the hypothetical maximum possible under a statute. 542 U.S. at 305-306.

Shepard, supra, and United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), followed. In Booker, the Court found that federal sentencing guidelines which required - instead of just recommending - an increased sentence upon finding of certain facts by a sentencing court violated the Sixth Amendment by allowing a judge to make those findings by a preponderance rather than requiring them to be found by a jury by a preponderance of the evidence. 543 U.S. at 223-24. In Shepard, the question was whether a burglary met the definition of being a "generic burglary" for purposes of a sentencing enhancement. 544 U.S. at 16. The Court found that the sentencing court had violated the Sixth Amendment by making factual findings about the prior crime by looking at materials beyond the statutory definition of the crime, the charging document and jury instructions used. 544 U.S. at 16.

Notably, in reaching its conclusion, the Shepard Court rejected the state's effort to characterize the determination of what the prior conviction entailed as proper as simply "a fact about a prior conviction" under Almendarez-Torres. Shepard, 544 U.S. at 26. Because "the fact necessary

to show a generic crime is not established by the record of conviction" in contrast to in Almendarez-Torres, the sentencing court considering the enhancement under the statute in Shepard would have to make "a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea[.]" Shepard, 544 U.S. at 26. That, it turn, raised the specter of the Sixth and Fourteenth Amendments, which "guarantee a jury standing between a defendant and the power of the State," as well as "a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." Shepard, 544 U.S. at 26.

Put another way, the Shepard Court declared, "[w]hile the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record," and "too much" like the kind of findings discussed in Apprendi, "to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute." Shepard, 544 U.S. at 25.

More recently, in 2013, the Court issued Alleyne v. United States, ___ U.S. __, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and Descamps v. United States, __ U.S. __, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). Again, the Court expanded our understanding of the scope of the rights involved. In Alleyne, the defendant was accused of a crime which carried an increased mandatory minimum sentence if there was a finding the defendant had "brandished" - rather than "merely carrying" - a gun. 133 S. Ct. at 2152. The Alleyne Court overruled its own decision from only 11 years before, where it had found a distinction for Sixth Amendment

purposes between facts which increase a mandatory minimum and those which increased the statutory maximum. In Alleyne, the Court held that, because "[m]andatory minimum sentences increase the penalty for a crime," any fact which increases the mandatory minimum is thus subject to the Sixth Amendment. 133 S. Ct. at 2152.

And then, in Descamps, the Court again addressed federal sentencing law, this time where there was an increase in the sentence of a defendant if they had three prior convictions for "a violent felony," which included a "generic burglary." 133 S. Ct. at 2278, 2285-86. The defendant's prior convictions included one which involved entry with intent to commit a crime but did not require the entry to be unlawful or demand breaking or entering. 133 S. Ct. at 2278. Because that prior conviction did not require the same proof as that required to prove the "generic burglary," the Court noted, making the required inquiry involved "judicial factfinding beyond the recognition of a prior conviction." Id. The Court went on:

> There's the constitutional rub. The Sixth Amendment contemplates that a jury - not a sentencing court - will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense.

133 S. Ct. at 2278-79. Indeed, the Court held, when a defendant enters a plea of guilty, he waives his rights to a jury determination of only the *elements* of the offense, "whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." Id.

And about a month ago, again, the Court addressed the question of the limits of permissible fact-finding regarding a prior conviction under the "prior conviction" exception. Mathis v. United States, __ U.S. __, 136 S. Ct. 2243, __ L. Ed. 2d __ (June 23, 2016). Mathis involved the federal sentencing enhancement which applies when there is a prior conviction which is a "generic burglary." The defendant's prior conviction was under a burglary statute which defined the crime to include separate means, one of which would qualify the conviction as a "generic burglary" for the enhancement, the other of which would not. Id.

The state claimed that it was proper for a judge to find which "means" had been involved in the prior conviction, under Almendares-Torres and its progeny. Id. The Court disagreed. Further, the Court rejected the idea that the inquiry could be performed even in cases where there was clear evidence from which the finding of which means had been involved could be made. 136 S. Ct. at 2251-52. Recognizing that it might seem sometimes "counterintuitive" because it might be easy in some cases for a judge to discern whether the defendant's conduct met the definition of a "generic burglary" even though the overall crime was more general, the Court still found that it "would raise serious Sixth Amendment concerns" to hold to the contrary. Mathis, 136 S. Ct. at 2252. The Court then clarified the "prior conviction exception" and its scope, noting that a jury, not a judge, must find any facts which increase the penalty, except for the "simple fact of a prior conviction." Id.

The facts the prosecution must prove in order to support a Persistent Offender sentence far exceed the "simple fact of a prior

conviction." To meet its burden of proving that the defendant meets the definition of a "[p]ersistent offender," the prosecution must show 1) the person is an "offender" for the current offense, 2) the current offense meets the definition of a "most serious offense," 3) the person has at least two prior convictions as an "offender," 4) those prior convictions were for offenses which would be considered "most serious offenses" in this state, 5) those prior convictions had not "washed out" and would still be counted in the offender score under RCW 9.94A.525, 6) those prior qualifying convictions occurred on "at least two separate occasions," and 7) at least one of the two previous convictions occurred before any other prior "most serious offense" was committed, not the date on which the conviction itself occurred. RCW 9.94A.030(37).

Thus, the prosecution's burden requires far more than proof merely of the existence of the prior crimes. See, e.g., Almendarez-Torres, 521 U.S. at 236. The necessary factual findings include that the defendant meets the definition of "offender" for the current offense, that the current offense met the definition required, that there were at least two prior strikes which had occurred, and that they occurred in a certain temporal order. Under the POAA, those findings must be made by a judge, not a jury, and may be made on far less proof than "beyond a reasonable doubt." The POAA is thus no longer constitutional, as it allows a judge to make factual findings and rely on them in imposing a POAA sentence which could not have been imposed based solely on the jury's verdict. This Court should so hold.

e. The prosecution failed to meet its burden of proof

Finally, the prosecution failed to show that a POAA sentence should be imposed. To meet its burden of proving that the defendant meets the definition of a "[p]ersistent offender," the prosecution must show 1) the person is an "offender" for the current offense, 2) the current offense meets the definition of a "most serious offense," 3) the person has at least two prior convictions as an "offender," 4) those prior convictions were for offenses which would be considered "most serious offenses" in this state, 5) those prior convictions had not "washed out" and would still be counted in the offender score under RCW 9.94A.525, 6) those prior qualifying convictions occurred on "at least two separate occasions," and 7) at least one of the two previous convictions occurred before any other prior "most serious offense" was committed, not the date on which the conviction itself occurred. RCW 9.94A.030(37).

The prosecution's burden of proving these facts exists as a matter of law, separate from the burden of simply proving criminal history for an offender score in a non-POAA case. See Knippling, 186 Wn.2d at 103. Further, arguing that the prosecution has not met this burden is not a "collateral attack" on the prior conviction. Id. Instead, it is a proper issue to be raised in this appeal, directed at the "present use of a prior conviction to establish" "current status as a persistent offender." Id.; see State v. Carpenter, 117 Wn. App. 673, 678, 72 P.3d 784 (2003).

Thus, in Knippling, the prosecution failed to meet its burden of proving the defendant was a "persistent offender" by failing to prove he was an "offender" as that term is described, to involve either an adult or a

juvenile whose case was properly declined to adult court. 186 Wn.2d at 103. At sentencing, the prosecutor presented a judgment and sentence for one of the prior strike crimes. 186 Wn.2d at 103. That document, however, showed that the defendant was a juvenile at the time of that prior conviction. Id. And nothing presented by the prosecution in Knippling explained or indicated that the defendant had been properly declined. 186 Wn.2d at 103. As a result, because the prosecution failed to prove that the defendant was an "offender" for the prior crime, that crime could not be used to support a persistent offender sentence. Id.

Here, the record regarding the 2009 vehicular assault was insufficient to prove that the prior conviction was valid. For that offense, the Statement of Defendant on Plea of Guilty included a "Notification Relating to Specific Crimes," which stated, "**If Any of the Following Paragraphs *Do Not Apply.* They Should Be Stricken and Initialed by the Defendant and the Judge."** CP 98 (emphasis in original). The following boilerplate language was then stricken out:

> ~~(n) This offense is a most serious offense or strike as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offense, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.~~

CP 98.

This evidence shows that Moretti was affirmatively misadvised about the potential consequences of entering that plea in 2009. In exchange for waiving his important constitutional rights, he entered a plea to an offense which *was* a strike offense - but he was specifically told in

the plea agreement that it was *not*. A defendant's decision to enter a plea must be knowing, voluntary and intelligent. See Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976); Wood v. Morris, 87 Wn.2d 501, 507, 554 P.2d 1032 (1973). To be knowing and intelligent, the defendant must at the least have a correct understanding of the charge and the consequences of entering the plea. See State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001); CrR 4.2(d).

In the past, Washington courts made a distinction between consequences of a plea which were "direct" and "collateral." See State v. Holley, 75 Wn. App. 191, 196, 876 P.2d 973 (1994). And courts found that later possible "habitual criminal proceedings" were a "collateral" consequence, as were deportation proceedings. See id. More recently, however, courts recognized that this was a "somewhat arbitrary dichotomy." See State v. McDermond, 112 Wn. App. 239, 47 P.3d 600 (2002). Nevertheless, the "collateral/direct" consequences theory does not apply to affirmative misrepresentations. See, e.g., State v. Stowe, 71 Wn. App. 182, 858 P.2d 267 (1993). This is so even if the consequence for which there was apparent misadvice is normally a "collateral" consequence and thus not something defense counsel has an affirmative obligation to inform a client about. 71 Wn. App. at 187; see also, State v. Sandoval, 171 Wn.2d 163, 249 P.3d 1015 (2011) (incorrect advice about the immigration consequences of plea but plea form had boilerplate warning).

At the time the plea was entered in 2009 for the vehicular assault "strike" crime, appellant, who was 26 and had only completed only 8th

grade, was affirmatively misadvised that the conviction would *not* count as a strike crime. But the state then relied on that conviction as a "strike" crime in this case. Because the evidence of the prior crime presented by the state below shows that the plea was invalid, the prosecution failed to meet its burden of proof to support the POAA sentence even if such a sentence could constitutionally be imposed based on the facts of this case and the procedure used below. This Court should so hold.

3. THE SENTENCING COURT ERRED IN FAILING TO CONSIDER ACTUAL ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS AND COSTS OF INCARCERATION

At sentencing, the court ordered legal financial obligations including a victim assessment, court costs, costs for court-appointed counsel and a DNA collection fee, for a total of $1,375. CP 102. Preprinted on the judgment and sentence was the following "boilerplate" language on "**Legal Financial Obligations/Restitution**:"

> The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).
>
> The court makes the following specific findings:
>
> ☐ The defendant has/will have the ability to pay the restitution and legal financial obligations in the future.
>
> ☐ The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):_____
>
> ☐ The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

☐ (Name of agency) ___'s costs for its emergency response are reasonble. [sp] RCW 38.52.430 (effective August 1, 2012).

☒ The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 145 The next page of the judgment and sentence had more pre-printed language, as follows:

☒ The court orders the defendant to pay costs of incarceration at the rate of $___ per day (actual costs not to exceed $100 per day). *(JLR)* RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.

CP 145-46. Also pre-printed and thus apparently ordered in every case in Grays Harbor county was the following language, "[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments." CP 146. At sentencing, there was no discussion of any of these orders or of appellant's financial situation and ability to pay, despite being indigent and sentenced to life in prison without the possibility of parole. RP 419-423.

This Court should reverse these orders under Blazina and its progeny. In Blazina, our state's highest court looked at RCW 10.01.160(3), the statute authorizing imposition of legal financial obligations. 182 Wn.2d at 835. That statute provides that the court "shall not order the defendant to pay costs unless the defendant is or will be able to pay them," and further that the court "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose" before ordering a defendant to pay legal financial

obligations (LFOs). Blazina, 182 Wn.2d at 836. The Court held that the statutory mandate prohibited a sentencing court from imposing an an order of such costs without first making a detailed examination of whether the defendant has the actual or likely ability pay. 182 Wn.2d at 835. This requires more than just being able-bodied and thus not generally precluded from getting a job. 182 Wn.2d at 835. Instead, the sentencing court must make a finding of actual ability to pay based on a detailed look at such things as the length of incarceration, existing financial obligations and whether the defendant qualified for a public defender and thus was indigent. Id.

Further, the Blazina Court rejected the very same kind of pre-printed "boilerplate" finding of "ability to pay" used in this case. 182 Wn.2d at 836. Such findings do not meet the requirements, the Court held, because, "[p]ractically speaking, this imperative under RCW 10.01.160(3) means a court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. In addition to looking at existing financial debt and other factors, the Blazina Court also noted that if someone met the requirements of proving they were indigent, "courts should seriously question that person's ability to pay[.]" Id.

The Court has recently reaffirmed Blazina and further held that the issue is not waived when not objected to below. See State v. Duncan, 185 Wn. 2d 430, __ P.3d __ (No. 90188-1) (April 28, 2016). In fact, the Court so held not only for imposition of discretionary LFOs but also those mandated by statute. 185 Wn.2d at __ (slip op. at 2 n. 3).

The Court has also extended the holding of Blazina to cover an order of costs of incarceration under a different statute, RCW 9.94A.760(2). See State v. Leonard, 184 Wn.2d 505, 358 P.3d 1167 (2015). Under that statute, an order of costs of incarceration cannot be imposed unless the trial court finds "that the offender, at the time of sentencing, has the means to pay." Id., quoting, RCW 9.94A.760(2). The Leonard Court held that the statute thus requires "individualized sentencing inquiries regarding the ability to pay similar to the statute at issue in Blazina," prior to any order of costs of incarceration. Leonard, 184 Wn.2d at 506.

Here, the sentencing court explicitly did *not* mark the portion of the judgment and sentence which found the "ability to pay" costs of incarceration. See CP 145-47. Yet the court apparently ordered appellant to pay those costs. As that order is unsupported by the required findings on appellant's actual financial situation and ability to pay, it must be stricken.

So must the other LFOs and the egregious terms of payment, such as the imposition of 12 percent interest from the date of the judgment and sentence. Just like the defendants in Blazina, appellant is indigent. He qualified for a public defender at trial and in this appeal. He was given appointed counsel due to his lack of resources. There was no evidence presented at trial that he had any money or ability to pay costs. And the sentencing court did not, in fact, make the required findings, instead just entering the judgment and sentence with an improper "boilerplate" pre-

printed "finding" of "ability to pay" condemned in Blazina. Reversal and remand for resentencing is required.

4. INTERPRETING SINCLAIR TO REQUIRE IMPOVERISHED APPELLANTS TO REBUT AN APPARENT PRESUMPTION OF IMPOSITION OF COSTS ON APPEAL FUNS AFOUL OF NOLAN AND IS UNCONSTITUTIONAL UNDER FULLER AND BLANK

In Sinclair, supra, a defendant/appellant unsuccessfully appealed his criminal conviction and, after the decision on the merits so holding, the prosecution filed a request for costs. Sinclair, 192 Wn. App. at 385. The defendant objected. Id. On reconsideration, the prosecution urged Division One to impose costs on appeal against an unsuccessful appellant in *every* criminal case, claiming that the statutory opportunity for a defendant to later bring a request to remit costs was sufficient to ensure that appellate costs were proper. 192 Wn. App. at 388-89. While Division One disagreed, it also disagreed with this Court that Blazina applied to the question of imposition of costs on appeal, instead finding that the issue involves more than just a question of "ability to pay" but also whether discretion should be exercised to order costs on appeal in the first place. Sinclair, 192 Wn. App. at 388-89.

The Sinclair Court also disagreed with this Court's remedy of ordering costs on appeal in such situations conditioned upon a finding of remand by the trial court that the indigent defendant had "ability to pay" as defined in Blazina. Sinclair, 192 Wn. App. at 388-89. For Division One, entering such a conditional order amounted to delegation of the appellate court's duties. Id.

The Sinclair Court then crafted two new pleading requirements;

1) an appellant must set forth "[f]actors that may be relevant to an exercise of discretion" to impose appellate costs in case there is a future request for costs by the respondent and 2) the prosecution must make arguments regarding this issue in its "brief of respondent" in order to "preserve the opportunity to submit a cost bill" should it later decide one is warranted. 192 Wn. App. at. 390-91.

The Sinclair Court also ruled on the merits of the request in that particular case. 192 Wn.2d at 391-92. Division One recognized a presumption of indigence which applies throughout the appeal under RAP 15.2(f), unless it is rebutted by the state. Sinclair, 192 Wn. App. at 391-92. That Court then rejected the idea that imposition of costs on appeal was proper because of the defendant's prior solid work history and the lack of evidence that he might be "unable" to work in the future. Id. Instead, the Court pointed out that Mr. Sinclair had been found indigent both at trial and on appeal and there was "no reason to believe Sinclair is or ever will be able to pay $6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent)." Id. Because there was no trial court order that Sinclair's financial situation had improved or was likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s if he did not die in prison, the Court exercised its discretion to deny the state's request for appellate costs. Id.

This Court has not yet indicated if it will follow the decision in Sinclair and change its existing procedures. But Sinclair should not - and cannot - be interpreted to create a presumption that costs on appeal will be

imposed against an indigent appellant unless they meet a requirement of proving otherwise, because of the fundamental constitutional rights involved.

At the outset, this very question has been decided by our highest Court. In Nolan, supra, the prosecution argued that costs should be awarded virtually as an "automatic" process in every criminal case, even if the defendant is indigent and the appeal not wholly frivolous. Nolan, 141 Wn.2d at 625-26. The Court rejected those claims. Even it a party establishes that they were the "substantially prevailing party" on review, the Court held, the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide in an exercise of its discretion whether to impose costs even when the party seeking costs is technically entitled to them. Nolan, 141 Wn.2d at 628.

There is a second problem with interpreting Sinclair to provide that an appellant's failure to preemptively object to imposition of costs on appeal will result in automatic imposition of such costs. In order to fully understand this issue, it is important to look at the rights involved. There is no federal constitutional right to appeal a criminal conviction. See McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894). Our state constitution, however, guarantees such a right. Blank, 131 Wn.2d at 244-46.

As a result, anyone convicted of a crime in our state courts has a constitutional right to a full, fair and meaningful appeal - and further, to appointed counsel at public expense if the person is indigent. See State v.

Giles, 148 Wn.2d 449, 450-51, 60 P.3d 1208 (2003); Blank, 131 Wn.2d 244.

The state constitutional right to appeal is not, however, the only right involved. Where, as here, a state creates a right, federal due process and equal protection mandates apply and preclude the state from burdening the right in particular ways. See Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). As a result, when there is a state-created constitutional right to appeal, that appeal must be more than a "meaningless ritual" and must comport with basic notions of fairness. See Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The due process clause of the Fourteenth Amendment guarantees a criminal appellant who is pursuing her first appeal of "right" in a state court certain minimum safeguards to make the appeal "adequate and effective," including the right to counsel. Id. Further, even though no federal right to *appeal* is involved, federal due process and equal protection mandates apply to the procedures used in deciding a first appeal as right. See Evitts v. Lucey, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

Thus, state constitutional rulings are not the only arbiter of the constitutionality of a state practice in an appeal brought as a matter of state constitutional right.

This intertwining of federal and state constitutional principles is at issue here, where an impoverished person chooses to exercise a state constitutional right and is required to pay to do so. In general, it is unconstitutional to require payment for the exercise of a constitutional

right. See Fuller, supra. In Fuller, however, the U.S. Supreme Court upheld a statute requiring an indigent defendant who received appointed counsel on appeal due to poverty to later repay that cost if he had become able. 417 U.S. at 45.

In reaching its conclusion, the Fuller Court relied on several crucial features of the statute in question. First, the statute did not make repayment mandatory. 417 U.S. at 45. Second, it required the appellate court to "take into account the defendant's financial resources and the burden that payment would impose." See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller). Third, the statute provided that no payment obligation could be imposed "if there was no likelihood the defendant's indigency would end." Fuller, 417 U.S. at 46. Fourth, under the statute, no convicted person could be held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

Based upon these careful proscriptions on how the repayment obligation was imposed and enforced, the Fuller Court was convinced the relevant statute did not penalize those who exercised their rights but simply "provided that a convicted person who later becomes able to pay . . .may be required to do so." 417 U.S. at 53-54. Because the legislation was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to to meet it without hardship," the statute was constitutional. 417 U.S. at 53-54.

In Blank, supra, our Supreme Court examined Fuller and upheld our state's own "recoupment" statute for appeals, RCW 10.73.160. That statute provides, in relevant part:

> (1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.
>
> (2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.
>
> (3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.
>
> (4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Blank, 131 Wn.2d at 245; quoting, RCW 10.73.160.

In upholding the constitutionality of the statute, the Blank Court was convinced that the remission procedure in subsection (4) of the statute would operate to ensure that the statute was consistent with the mandates of Fuller. Blank, 131 Wn.2d at 246. Indeed, the Blank Court was

confident that trial courts would be following the analysis and requirements of Fuller in deciding issues regarding enforcement and collection of costs on appeal. Blank, 131 Wn.2d at 246.

Blank was decided in 1997. But last year, in Blazina, the Supreme Court issued its decision which cast serious doubt on the continuing validity of Blank - and whether the recoupment statute can still be deemed "constitutional." By statute, an award of costs on appeal becomes part of the judgment and sentence, so that it may be collected against by the state just as trial LFOs. RCW 10.73.160(3). The same 12 percent interest that the Supreme Court found untenable in Blazina, the same ever-deepening hole of collection, the same problems of enforcement against an indigent, the same difficulty of the defendant to get a job with a criminal history once released let alone sufficient money to pay off the costs of appeal while in custody - in short, all but the concerns about the racial disparity in imposition of costs are clearly present in both situations.

In addition, there is a very significant difference between costs on appeal and trial costs not discussed in Sinclair. Costs imposed at trial are part of the sentence, intended to serve those punitive purposes, but the ostensible purpose of appellate "recoupment" statutes such as RCW 10.73.160(3) is "not punishment but simply a fiscal interest in recovering money expended and in discouraging fraudulent assertions of indigency." Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J. OF L. REFORM 323, 339 (2009).

We now know, because of Blazina, that the protections the Court relied on in Blank do not exist and people are, in fact, spending time in jail for nonpayment of legal financial obligations they are unable to pay because of poverty. Because appellate costs are included as part of those LFOs because they are added to the judgment and sentence, the impacts noted in Blazina will fall equally on appellants. Under Fuller, no payment obligation can be imposed "if there was no likelihood the defendant's indigency would end." Fuller, 417 U.S. at 46. Further, under Fuller, this Court cannot impose costs on appeal unless it considered the appellant's actual ability to pay, not simply based on a presumption that costs *will* be imposed unless the defendant provides sufficient evidence that they should not or meets some briefing requirement on that point. This Court should decline to follow Sinclair and should further decline to impose costs on appeal in this case where the appellant has been ordered to die in prison.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial with new counsel. Further the POAA sentence should be stricken. Finally, this Court should decline to adopt Sinclair or impose costs on appeal and strike the LFO's below.

DATED this 28th day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel via first-class postage prepaid, to Grays Harbor County 102 W. Broadway, Montesano, WA. 98563, and to Mr. Anthony Moretti, DOC 860499, Clallam Bay CC, 1830 Eagle Crest Way, Clallam Bay, WA. 98326.

DATED this 28th day of July, 2016

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